

No. SC 83391

IN THE

SUPREME COURT OF MISSOURI

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STATE OF MISSOURI, ex rel. STACEY SUE GREENWOOD  
INDIVIDUALLY AND AS THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF MICHAEL J. GREENWOOD,

Relator,

-vs-

THE HONORABLE JON R. GRAY, JUDGE,  
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,

Respondent.

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RESPONDENT'S BRIEF

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## **JURISDICTIONAL STATEMENT**

This writ proceeding is before the Court on Relator's Petition seeking prohibition to prevent a judge of the Circuit Court of Jackson County from implementing his order transferring the underlying tort action to Dallas County, Missouri, the jurisdiction where the vehicle accident occurred from which the underlying action arises, or St. Louis County, where the registered agent of defendant American Isuzu is located. Respondent concurs with Relator that jurisdiction is proper pursuant to Article V, Section 4, of the Missouri Constitution. Respondent denies the averment contained in Relator's Jurisdictional Statement that American Isuzu Motors, Inc., has "no residence in Missouri." American Isuzu Motors, Inc., has a registered agent in Clayton, St. Louis County, Missouri. (Relator's Petition for Writ of Prohibition ¶ 1.) Therefore, American Isuzu resides, for the purposes of Mo. Rev. Stat. § 508.010, in St. Louis County, Missouri.

## **STATEMENT OF FACTS**

Respondent concurs with Relator's Statement of Facts but supplements Relator's Statement of Facts as follows:

Relator in the underlying lawsuit filed an original Petition against defendants Kenneth Williams, a resident of Arkansas, and American Isuzu Motors, Inc. ("Isuzu"), a foreign corporation with its registered agent in St. Louis County, Missouri, on September 28, 2000. On October 2, 2000, Relator filed a First Amended Petition naming Missouri residents Ryan Pace and Mike Adams as additional defendants. (Relator's First Amended Petition at ¶¶ 2,3, Relator's Appendix to the Petition for Writ of Prohibition (the "Appendix"), Exhibit 2). Isuzu was not served with the original Petition until October 26, 2000. The following table summarizes the procedural history of this lawsuit:

9/28/00	Plaintiff files Petition against Williams and American Isuzu (Relator's Appendix Exh. 1).
10/2/00	Plaintiff files First Amended Petition against Williams, American Isuzu, Adams and Pace (Relator's Appendix Exh. 2).
10/11/00	American Isuzu is served with the First Amended Petition (Exh. 1 of Relator's Appendix Exh. 6).
10/26/00	American Isuzu is served with the Petition.
10/29/00	Defendants Adams and Pace are served with the First Amended Petition.

10/31/00	American Isuzu files its Motion to Dismiss or Transfer for Improper Venue (Relator's Appendix Exh. 6).
11/08/00	Motion for Change of Venue filed by Adams and Pace (Relator's Appendix Exh. 3).

**POINTS RELIED ON**

**RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING THIS ACTION TO DALLAS COUNTY OR ST. LOUIS COUNTY BECAUSE VENUE IN THIS ACTION IS NOT PROPER IN JACKSON COUNTY PURSUANT TO MO. REV. STAT. § 508.010, IN THAT THE CAUSE OF ACTION ACCRUED IN DALLAS COUNTY, DEFENDANT AMERICAN ISUZU MOTORS INC. RESIDES IN ST. LOUIS COUNTY WHERE ITS REGISTERED AGENT IS LOCATED, DEFENDANT PACE RESIDES IN POLK COUNTY, DEFENDANT ADAMS RESIDES IN HICKORY COUNTY, DEFENDANT WILLIAMS IS A NONRESIDENT OF MISSOURI, AND NO DEFENDANT RESIDES IN JACKSON COUNTY.**

State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901 (Mo. banc 1996)

State ex rel. Malone v. Mummert, 889 S.W.2d 822 (Mo. banc 1994)

Bowden v. Jensen, 359 S.W.2d 343 (Mo. banc. 1962)

State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. Ct. App. 1993)

Mo. Const. art. V § 4

Mo. Rev. Stat. § 351.375

Mo. Rev. Stat. § 351.572

Mo. Rev. Stat. § 351.582

Mo. Rev. Stat. § 351.586

Mo. Rev. Stat. § 351.588

Mo. Rev. Stat. § 351.620 (repealed)

Mo. Rev. Stat. § 351.625 (repealed)

Mo. Rev. Stat. § 508.010

Mo. Rev. Stat. § 508.040

## ARGUMENT

**RELATOR IS NOT ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TRANSFERRING THIS ACTION TO DALLAS COUNTY OR ST. LOUIS COUNTY BECAUSE VENUE IN THIS ACTION IS NOT PROPER IN JACKSON COUNTY PURSUANT TO MO. REV. STAT. § 508.010, IN THAT THE CAUSE OF ACTION ACCRUED IN DALLAS COUNTY, DEFENDANT AMERICAN ISUZU MOTORS INC. RESIDES IN ST. LOUIS COUNTY WHERE ITS REGISTERED AGENT IS LOCATED, DEFENDANT PACE RESIDES IN POLK COUNTY, DEFENDANT ADAMS RESIDES IN HICKORY COUNTY, DEFENDANT WILLIAMS IS A NON-RESIDENT OF MISSOURI, AND NO DEFENDANT RESIDES IN JACKSON COUNTY.**

### **A.     Standard of Review**

“In a prohibition proceeding the burden is on the petitioning party to show that the trial court exceeded its jurisdiction, and that burden includes overcoming the presumption of right acts and in favor of the trial court’s ruling.” State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 69 (Mo. Ct. App. 1997). Relator has the burden of showing that respondent exceeded his jurisdiction. Respondent is presumptively correct in determining if he has jurisdiction. State ex rel. Missouri Ozarks Economic Opportunity Corp. v. Long, 763 S.W.2d 381, 382-83 (Mo. Ct. App. 1989).



**B. Background**

On September 28, 2000, Relator filed the original Petition initiating the underlying action against American Isuzu and defendant Kenneth Dwayne Williams (“Williams”). The vehicle accident giving rise to this cause of action occurred in Dallas County, Missouri. American Isuzu is a California corporation with its registered agent in St. Louis County, Missouri. Defendant Williams is a resident of Arkansas.

On October 2, 2000, Relator filed an Amended Petition naming Ryan Pace (“Pace”) and Mike Adams (“Adams”), residents of Polk County and Hickory County, Missouri, respectively, as codefendants. Relator then served American Isuzu with the Amended Petition on October 11, 2000. American Isuzu was not served with the original Petition until October 26, 2000.

Because the case and its parties had no connection to Jackson County, Missouri, defendants American Isuzu, Pace, and Adams moved to transfer for improper venue. The motions to transfer were heard on January 12, 2001. Judge Jon R. Gray entered a Hearing Memorandum concluding that Jackson County, Missouri, was an improper venue, and St. Louis County and Dallas County, Missouri, were appropriate venues for this lawsuit. The trial court indicated it would enter an Order sustaining the motions unless a Writ was filed prohibiting it from doing so by February 1, 2001. On January 29, 2001, Relators filed a Petition for Writ of Prohibition in the Western District of the Missouri Court of Appeals requesting Respondent be prohibited from transferring the matter from Jackson County, Missouri. The Court of

Appeals denied plaintiff's Writ on February 5, 2001. On or about February 16, 2001, Relator filed a Writ in this Court requesting the same relief.

It is undisputed that if the averments in Relator's First Amended Petition are considered, venue is improper in Jackson County. Relator claims venue was originally proper in Jackson County due to the filing of the original Petition against defendants Williams and American Isuzu under Mo. Rev. Stat. § 508.010(4) because all of the defendants are nonresidents of the state. (Relator's Brief at p. 21). Relator's argument is flawed for several reasons. First, as is discussed below, the original Petition is of no significance in determining proper venue. Second, even if the Court considers the averments in the original Petition, which was abandoned by plaintiff, American Isuzu "resides" in St. Louis County, Missouri, where its registered agent is located, under Mo. Rev. Stat. § 508.010. Accordingly, under the averments in either the First Amended Petition or the abandoned original Petition, venue is not proper in Jackson County, Missouri.

Relator concedes American Isuzu is a foreign corporation. Relator nevertheless engages in a novel, yet legally unsupported argument that Mo. Rev. Stat. § 508.010(4) applies to determine venue rather than Section 508.010(3). Relator suggests this Court should disregard forty years of case law holding that under Section 508.010, a foreign corporation's residence is in the county where its registered agent is located. Relator's primary argument that a corporation must "live one's life" in Missouri conflicts with established Missouri precedent holding that the residence of a foreign corporation for purposes of Section 508.010 is its registered agent. Further, Relator's argument treats registered foreign corporations

differently than domestic corporations, in direct contravention of Mo. Rev. Stat. § 371.582.

Finally, Jackson County is not a convenient or logical forum for this lawsuit. Respondent acted within his jurisdiction in granting defendant's Motion to Dismiss. Relator's Writ of Prohibition should be denied.

**C. Venue Is Improper in Jackson County**

If the Court considers the averments in the First Amended Petition, see Section C.4, infra, it is undisputed venue is not proper in Jackson County. Relator therefore attempts to establish venue through the abandoned original Petition. Relator's claim that the original Petition provides the basis for venue in Jackson County is based solely on the contention that defendant American Isuzu Motors, Inc. ("American Isuzu") has no residence for purposes of determining venue under the general venue statute, Mo. Rev. Stat. § 508.010<sup>1</sup> ("Section 508.010"). To successfully claim that Jackson County is a proper venue under Section 508.010, Relator must prevail on both of two theories: (1) that venue is proper anywhere in the state as to a foreign corporation that does business in the state, despite the fact that the corporation has a registered agent at a specific place in Missouri; and (2) that a plaintiff can manipulate venue by separating defendants between those for whom venue is proper, naming them in an original petition, and those for whom venue is improper, naming them in an amended

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1. It is undisputed that Mo. Rev. Stat. § 508.010 applies, not the corporate venue statute, Mo. Rev. Stat. § 508.040.

petition, filed nearly simultaneously with the original and served prior to the original. Both of these arguments fail.

**1. Under Section 508.010, American Isuzu, a registered foreign corporation, resides where its registered agent is located.**

“Venue in Missouri is determined solely by statute.” State ex rel. Rothermich v. Gallagher, 816 S.W.2d 194, 196 (Mo. banc 1991). “The purpose of the venue statutes is to provide a convenient, logical and orderly forum for litigation.” Id. Under Section 508.010, suit may be brought in any county of the state in which any defendant resides or where the cause of action accrued. Mo. Rev. Stat. § 508.010(3,6). Under Section 508.010, the residence of a foreign corporation, like a domestic corporation, is where its registered agent is located. State ex rel. Malone v. Mummert, 889 S.W.2d 822, 823-24 (Mo. banc 1994) (foreign corporation “resides” under Section 508.010 where its registered agent is located); Bowden v. Jensen, 359 S.W.2d 343, 351 (Mo. banc 1962) (same), abrogated to the extent it declares Section 508.040 does not apply to multiple corporations, State ex rel. Webb v. Satz, 561 S.W.2d 343, 351 (Mo. 1962); State ex rel. Quest Communications Corp. v. Baldrige, 913 S.W.2d 366, 368 (Mo. Ct. App. 1996).

In the present case, the underlying vehicular accident occurred in Dallas County, Missouri. Defendant Williams is an individual nonresident defendant. American Isuzu is a foreign corporation, which maintains a registered agent in the County of St. Louis pursuant to Mo. Rev. Stat. § 351.572. (Plaintiff’s Petition for Writ of Prohibition ¶ 1.) Therefore, under

Section 508.010, venue is proper in either Dallas County or St. Louis County under plaintiff's original Petition.

To counter this well-settled rule regarding venue, Relator attempts to create an issue where precedent has established that no issue exists. Relator claims Missouri courts have not examined whether registered foreign corporations like American Isuzu with no formal office to conduct its business in Missouri should be considered to reside, for purposes of Section 508.010, where its registered office is located. This is incorrect, as this Court as well as the Court of Appeals have held the registered agent of a foreign corporation establishes venue.

In Malone, two corporate defendants were sued along with two individual defendants. Venue in the City of St. Louis was premised on the office of the registered agent for defendant Cotter Company, a Delaware corporation doing business as a wholesale cooperative serving its member hardware stores. Malone, 889 S.W.2d at 823-24. The other corporate defendant was a Missouri corporation. Id. at 823. This Court concluded the individual defendants were not pretensively joined, then held venue was proper under Section 508.010 on the basis of Cotter Company's registered agent. Id. at 826. There was no evidence Cotter, a registered foreign corporation like American Isuzu, maintained any "office or agent for the transaction of its usual and customary business" in Missouri, yet this Court specifically held that the registered agent of the foreign corporation established venue in the City of St. Louis. Id. at 824 (citing Bunting v. Koehr, 865 S.W.2d 351 (Mo. banc 1993) (noting the term "agent" under Section 508.040 does not include the member hardware stores)).

In Quest Communications, the corporate defendant Quest Communications Corporation (“Quest”) was sued along with an individual in Jasper County, Missouri. Quest was a Florida corporation registered to do business in Missouri and maintained a corporate office in Johnson County, Kansas. Quest Communications, 913 S.W.2d at 368. Quest was served with process through its registered agent in the City of St. Louis. Id. The plaintiff argued venue was proper in Jasper County under Section 508.010(4) on the claim against the individual defendant and under Section 508.040 on the claim against Quest. Id. at 368. However, the Court of Appeals concluded that Section 508.010 applied and venue was proper in either Jackson County, where it concluded the individual resided, or St. Louis City, where Quest’s registered agent was located. Id. at 371. The Court specifically held, “Quest, the foreign corporate defendant, resides in the City of St. Louis for venue purposes”. Id.

Finally, in State ex rel. England v. Koehr, 849 S.W.2d 168 (Mo. Ct. App. 1993), the appellate court specifically rejected premising venue under Section 508.010 on an office for a corporation’s “conduct of its business.” In England, the plaintiff sued an individual resident of St. Louis County and Heico, Inc., a Nevada corporation not registered to do business in Missouri, on claims arising from an accident in St. Genevieve County. England, 849 S.W.2d at 168. The trial court denied defendant’s motion to transfer, on the grounds “in the City of St. Louis, Heico was a “de facto resident” of St. Louis City on the basis of the presence of an office of its Spartan Tool Division, even though it had no registered agent in Missouri. Id. The appellate court issued a writ of prohibition directing that the motion to transfer of the respondent be sustained. The court applied the language of Mo. Rev. Stat.

§ 351.375(3) (1986) and held that a foreign corporation without a registered agent has no residence in Missouri, even if the corporation has an office for the conduct of its business in Missouri. Id. at 169 (citing Bowden, 359 S.W.2d at 350). In the present case, the converse of the England holding applies -- a foreign corporation with a registered agent in Missouri resides where the registered agent is located, even if the corporation has no office for the transaction of its usual and customary business.

Thus, contrary to Relator's assertion, Missouri courts have consistently held the registered agent of a foreign corporation establishes venue.

**2. The 1990 change in the statute governing the change of a foreign corporations registered office for its agent does not affect this Court's analysis under Section 508.010.**

Relator claims a 1990 change in the statute governing the "Change of registered office of agent of foreign corporation," Mo. Rev. Stat. § 351.588, should alter 40 years of case law holding that a registered foreign corporation resides under Section 508.010 where its registered agent is located. (See Relator's Brief at p. 16). When the 1990 restructuring of the statutes governing foreign corporations are considered in total, the change referred to by Relator in Mo. Rev. Stat. § 351.588 cannot be construed to alter this Court's venue analysis. A foreign corporation's registration to do business in the state of Missouri "authorizes it to conduct business in Missouri and makes it 'subject to the same duties, restrictions, penalties,

and liabilities . . . imposed on, the domestic corporation of like character.’” State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 168 (Mo. banc 1999) (quoting Mo. Rev. Stat. § 351.582(2) (1990)) (omissions in original) (emphasis added).<sup>2</sup> Under this statute, Missouri treats American Isuzu no different than a Missouri corporation. Missouri courts have consistently adhered to the language in venue cases by treating registered foreign corporations as equivalent to a domestic corporation. Malone, supra; Quest, supra; England, supra.

Relator also suggests Bowden v. Jensen should be overturned because Mo. Rev. Stat. § 351.588 has replaced Mo. Rev. Stat. § 351.625. However, Bowden did not rely on Mo. Rev. Stat. § 351.625 for its holding that a registered agent establishes a foreign corporation’s

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**2. 351.582. Effect of certificate of authority --**

1. A certificate of authority authorizes the foreign corporation to which it is issued to transact business in this state subject, however, to the right of the state to revoke the certificate as provided in this chapter.
2. A foreign corporation with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and except as otherwise provided by this chapter, is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character.
3. This chapter does not authorize this state to regulate the organization or internal affairs of a foreign corporation authorized to transact business in this state.

Mo. Rev. Stat. § 351.582 (1990) (emphasis in original).



residence. Rather, this Court relied on Section 351.620. Bowden, 359 S.W.2d at 350. Moreover, the successor to Section 351.620, Mo. Rev. Stat. § 351.586, establishes an identical requirement that foreign corporations must register to do business. Section 351.588 deals only with the “Change of registered office of agent of foreign corporation.”

Relator is essentially arguing for a retreat to the pre-1943 rule regarding venue and corporations. In State ex rel. Henning v. Williams, 131 S.W.2d 561, 563-64 (Mo. banc 1939), this Court interpreted the existing general venue statute to allow venue to be fixed over a corporation “‘wherever its corporate business is done,’ that is, “where its officers and agencies are actually present in the exercise of its franchises and in carrying on its business; and that the legal residence of a corporation is not necessarily, confined to the locality of its principal office or place of business.’” State ex rel. Smith v. Gray, 979 S.W.2d 190, 192 (Mo. banc 1998) (discussing Henning and quoting Z.L. Slavens v. South Pacific R. Co., 51 Mo. 308, 310 (Mo. banc 1873)). However, in 1943 the General Assembly defined by statute the residence of corporations “for all purposes to be in the county where its registered office is maintained.” Smith, 979 S.W.2d at 192 (quoting Mo. Rev. Stat. § 351.375(3)). The Bowden court utilized this statutory language in reasoning that a foreign corporation should reside for purposes of Section 508.010 where its registered agent is located:

The theory that Sec. 351.620 was intended to give foreign business corporations a specific, definite and certain residence in this state, and that Sec. 508.010 subd. (2) should be construed with it, conforms to good business practice and the proper

protection of the rights of individual defendants who may be joined with corporate defendants. Such a construction makes for definiteness and certainty and an individual defendant when so joined may immediately and definitely determine whether the venue of the action is proper or improper as to him.

Bowden, 359 S.W.2d at 350. The Bowden court discussed the language cited by Relator in Mo. Rev. Stat. § 351.625 (repealed), but it also discussed and relied on the requirement that a foreign corporation register with the state of Missouri. Id. Although the language in the statute governing a change of registered office of an agent for a foreign corporation may have changed, the reasoning and logic of the Bowden court still applies. See England, 849 S.W.2d at 169 (“[I]t [the Bowman court] there held that the residence of the [foreign registered] corporation for purposes of venue was solely the location of its registered agent. It premised this conclusion upon protecting the resident individual defendant from the indefiniteness of knowing whether venue as to him was proper.”).

Contrary to the reasoning of Bowden, under Relator’s argument the individual defendant would no longer be able to use the definite location of a registered agent. Instead, the individual defendant would be forced to engage in an analysis of whether a defendant foreign corporation has an office for the “transaction of its usual and customary business,” a phrase rarely interpreted, much less defined, by Missouri courts. See Bowden, 359 S.W.2d at 350 (“how would defendant ‘Y’ go about determining whether the venue of the suit . . . was or was not proper to him?”); see generally State ex rel. Elson v. Koehr, 856 S.W.2d 57, 61 (Mo.

banc 1993) (“Neither party has directed us to any case that describes or defines the ‘usual and customary business’ of an airline, nor has our research uncovered one.”).

**3. The case law relied on by Relator for her proposition  
is inapplicable.**

Relator cites Stamm v. Mayfield and Bunkler Resource, Recycling and Reclamation, Inc. v. Dierker in support of her proposition that Missouri case law is uncertain on the issue raised in this writ. However, these opinions are inapplicable to the issue before the Court. Stamm v. Mayfield, 340 S.W.2d 631 (Mo. banc 1960), involved a nonregistered foreign insurance corporation which maintained a divisional office in the City of St. Louis. The Stamm court held that such an office established venue over the insurance corporation under Section 508.010(2). See Bowden, 359 S.W.2d at 348-49 (discussing Stamm). Missouri courts have historically treated insurance companies differently than other corporations for venue purposes. See State ex rel. Smith v. Gray, 979 S.W.2d 190, 192 (Mo. banc 1998) (“Although the 1943 law changed the rule for general and business corporations, it expressly does not apply to insurance corporations.”). Because American Isuzu is not an insurance corporation and is registered with the State, Stamm has no application to the present case.

In State ex rel. Bunkler Resource, Recycling and Reclamation, Inc. v. Dierker, 955 S.W.2d 931 (Mo. banc 1997), a dissolved Missouri corporation was sued by plaintiff due to injuries sustained in a vehicle accident. This Court found Section 508.040, the corporate venue statute, applied because only corporate defendants were involved. Bunkler Resource, 955 S.W.2d at 933. As Relator notes, this Court concluded venue was only appropriate where

the cause of action accrued, because the corporation had no office or agent for the transaction of its usual and customary business. Id. However, in the present case, it is undisputed Section 508.010 applies. Further, American Isuzu is not dissolved, and, as Relator concedes, American Isuzu has at all relevant times maintained a registered agent in Missouri.

**4. Venue should be determined according to the pleadings and record before the Court at the time the challenge is adjudicated based on the residence of the parties when the suit was filed.**

Relator claims courts must look at only an original petition when analyzing venue. This is contrary to Missouri law. Missouri courts have consistently held that the allegations regarding the parties included in the pleadings at the time the challenge is adjudicated are to be considered to determine venue, based on the residence of the parties at the time of the commencement of this lawsuit. State ex rel. Breckenridge v. Sweeney, 920 S.W.2d 901, 903 (Mo. banc 1996) (relying on allegations in Second Amended Petition in analysis of pretensive joinder claim) (citing State ex rel. DePaul Health Center v. Mummert, 870 S.W.2d 820, 823 (Mo. banc 1991)).

On September 28, 2000, Relator filed her original Petition. The original Petition included only American Isuzu and Williams as defendants. The next business day, October 2, 2000, Relator filed her First Amended Petition. American Isuzu was subsequently served with the Amended Petition on October 11, 2000. On October 26, 2000, American Isuzu was served with the original Petition. It is apparent Relator had every intention of bringing suit

against defendants Pace and Adams at the time the original Petition was filed, as evidenced by the lapse of time (or lack thereof) between the filings and the service of the original Petition on defendant American Isuzu after the Amended Petition was served.

In arguing that the Court should consider the original Petition, Relator ignores the fact she did not serve the original Petition on American Isuzu until after the First Amended Petition was both filed and served on the defendants. “[P]roper service of summons results in personal jurisdiction over the defendant served.” DePaul, 870 S.W.2d at 822; see also Yankee v. Franke, 665 S.W.2d 78, 79 (Mo. Ct. App. 1984) (“A proper summons is jurisdictional and is absolutely essential to the validity of the proceeding.”). Venue should not be considered proper, absent proper jurisdiction. State ex rel. Ford Motor Co. v. Westbrooke, 12 S.W.3d 386, 390 (Mo. Ct. App. 2000). Thus, Relator’s mere filing of the original Petition without proper service cannot constitute “bringing” suit for the purposes of determining venue as contemplated by this Court in DePaul.

Further, once an Amended Petition is filed, the prior Petition is abandoned. State ex rel. Crowden v. Dandurand, 970 S.W.2d 340, 342 (Mo. banc 1998); Evans v. Eno, 903 S.W.2d 258, 260 (Mo. Ct. App. 1995) (“When an amended petition has been filed, the original petition is thereby abandoned and it may not be considered for any purpose.”). Because the original Petition was abandoned, the Court never acquired jurisdiction over the parties named in the original Petition. DePaul, 870 S.W.2d at 822. Without proper jurisdiction, venue is not proper. Ford Motor Co., 12 S.W.3d at 390.

Relator may assert she is entitled to amend the Petition without leave of Court prior to the filing of a responsive pleading, but Relator's use of Rule 55.33(a) to amend the Petition does not alter the result. Missouri Rules of Civil Procedure must be construed within the limits of the jurisdiction of the courts of Missouri. State ex rel. Merritt v. Mummert, 863 S.W.2d 380, 382 (Mo. Ct. App. 1993) (citing Mo. R. Civ. P. 51.01). Allowing plaintiff to obtain venue through an abandoned pleading would impermissibly allow plaintiff to extend the court's jurisdiction. Sledge v. Town & Country Tire Centers, Inc., 654 S.W.2d 176, 179 (Mo. Ct. App. 1983) (Rule 51.01 "shall not be construed to extend or limit . . . the venue of civil actions."). A plaintiff may not utilize the state's pleading rules and venue statutes to engage in forum shopping through a pretensive choice of named defendants. See, e.g., Pataky v. Missouri Highway & Transp. Comm'n, 891 S.W.2d 457, 460 (Mo. Ct. App. 1994); Sledge, 654 S.W.2d at 180-81 ("We find it no less dangerous and destructive to permit collusive use of third-party practice to deny a defendant a venue to which he is statutorily entitled.")

Relator cites DePaul in support of the proposition that venue is determined at the instant when suit is brought. However, in Breckenridge, this Court noted DePaul does not stand for the proposition upon which Relator relies:

This passage from DePaul [stating "venue is determined as the case stands when brought, not when a motion challenging venue is decided"] is not on point. The venue statute and, in turn, the Court's reference to the statute in DePaul pertain to the residence

of parties defendant to a lawsuit, not the condition of the pleadings.

Breckenridge, 920 S.W.2d at 903. Thus, DePaul does not stand for the proposition that pleading rules may be utilized to manipulate venue. See DePaul, 870 S.W.2d at 821-23 (noting the “unending series of extraordinary writ actions in which [parties] entered protracted procedural plotting to embrace or avoid the generous juries of the City of St. Louis”).

Missouri courts have consistently admonished the practice of utilizing pleading rules in an attempt to gain a favorable forum. In both Sledge and Merritt, the appellate court looked beyond the allegations in the pleadings to “condemn allegations made pretensively for the purpose of bringing into the jurisdiction one who could not otherwise be subject to the court’s jurisdiction.” See Merritt, 863 S.W.2d at 382. In this case, this Court should take the same approach in looking at Relator’s procedure of adding two Missouri residents as defendants the next business day after filing the original Petition, in an attempt to gain access to a forum which Relator considers more favorable, but is not convenient, logical or authorized by the venue statute.

### **CONCLUSION**

Under either the original abandoned Petition or the First Amended Petition, venue is not proper in Jackson County. American Isuzu has a residence in Missouri for the purposes of determining venue in this lawsuit. The residence is St. Louis County, where its registered agent is located and was located at the time of the filing of this lawsuit. Section 508.010 applies and venue is proper where the cause of action accrued, Dallas County, or in

St. Louis County, where American Isuzu's registered agent is located. Mo. Rev. Stat. § 508.010(3,6). If the Court considers the averments in the First Amended Petition, Hickory or Polk counties would also be proper forums. Id. Neither of the petitions provide any connection between Jackson County and this lawsuit. Further, Jackson County is not a convenient or logical forum. The Respondent did not error in entering the Hearing Memorandum indicating his intention to transfer this matter to St. Louis County or Dallas County. Relator's request for an Order in prohibition preventing respondent from entering an Order transferring this cause of action should be denied.

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**CERTIFICATE REQUIRED BY SPECIAL RULE NO. 1(c)**

The undersigned does hereby certify that this brief complies with Special Rule No. 1(b), and contains 4943 words.

SHOOK, HARDY & BACON L.L.P.

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INC.

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify, pursuant to Special Rule No. 1, that (1) a hard copy of the foregoing document in the form specified by Special Rule No. 1(a) and (2) a copy of the disk required by Special Rule No. 1(f), was sent via First Class, U.S. Mail, postage prepaid, this \_\_\_\_\_ of \_\_\_\_\_, 2001, to the individuals below. The undersigned does also hereby certify that the disk required by Special Rule No. 1(f) is virus-free.

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